Editor's note: Appealed -- Affirmed Double J. Land & Cattle Co. v. US Dept. of the Interior, 91 F.3rd 1378 (10th Cir. 1996).

DOUBLE J LAND AND CATTLE CO.
PETER A. JAFFE

IBLA 90-155 Decided April 21, 1993

Appeal from a decision of the Grand Junction, Colorado, District Office, Bureau of Land Management, giving notice of trespass and notice to remove structures from public lands. COC-50483.

Affirmed.

1. Trespass: Generally

Where it is clear that lands on which a dam, pond, and field are situated are Federal lands and that no right- of-way or temporary use permit was issued either to place the dam or pond on those lands or to cultivate them, a trespass exists.

2. Trespass: Generally

Enclosing public lands by fencing them is itself an act of trespass. It is axiomatic that no legal entitlement is created by illegally enclosing lands. Thus, the fact that Federal lands on which the improvements were made may have been fenced as though they belonged to a person is not significant in determining whether there was a trespass.

3. Equitable Adjudication: Generally--Estoppel--Exchanges of Land: Generally--Trespass: Generally

Where unrebutted evidence shows that BLM never advised a trespasser (in writing or orally) that a pending land exchange application would resolve all outstanding trespasses, and where it was clear both from a notice of realty action published in the Federal Register and from the issuance of patent that lands where an agricultural trespass was ongoing were not in fact covered by the exchange, BLM is not estopped from prosecuting either that agricultural trespass or the subsequent construction in trespass of a dam and pond on the same public lands. The trespasser, as the exchange applicant, properly bore the burden of bringing the question of the ownership of the lands covered by the agricultural trespass into the exchange negotiations.

4. Trespass: Measure of Damages

> Anyone properly determined by BLM to be in trespass is liable to the United States for (1) reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. Where a trespasser does not take issue with the details of BLM's assessment of liability, and that assessment is in accordance with those principles, the assessment is properly affirmed.

5. Trespass: Generally--Trespass: Measure of Damages

> BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass, as part of its authority to require a trespasser either to rehabilitate lands harmed by the trespass or to pay the costs incurred by the United States in doing so.

APPEARANCES: Peter A. Jaffe, Vail, Colorado, pro se and for Double J Land and Cattle Company; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Double J Land and Cattle Company (Double J) and Peter A. Jaffe have appealed the December 13, 1989, notice of trespass and notice to remove structures issued by the Grand Junction, Colorado, District Office, Bureau of Land Management (BLM).

On May 4, 1989, Vern Albertson, a neighboring landowner, reported to BLM that "the Jaffees" might be building a ditch on public land "in the near future." On May 22, 1989, BLM placed in the file an Initial Report of Unauthorized Use, stating:

> Sometime during the week of May 5th, Mr. Vern Albertson observed that water flowing in his irrigation ditch had been cut off. Investigating upstream he found a small earthen dam had been constructed on his ditch * * * and his water was being diverted into another irrigation system owned by Mr. Peter Jaffe, a downstream landowner. Mr. Albertson contacted the watermaster for the Burns area to have his water returned into his ditch.
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> The watermaster instructed Mr. Jaffe to construct a bypass ditch around his pond to deliver [Albertson's] water. At this point Mr. Albertson informed this office of all this activity because he suspected that the new ditch was in trespass on BLM land and since his water was being passed down the ditch he wanted the

matter cleared up. Field inspection of the situation determined that the pond (dam dimensions are 15 feet high, 70 feet long, pond is .05 acres) [1/] and associated spillway * * *, the new ditch * * *, and a five acre field * * * under cultivation downstream from the pond are in trespass. This was determined by locating these facilities in relation to located tract corners and a section corner.

The record indicates that the alleged trespass was occurring in the NW¼ NW¼, sec. 29, T. 2 S., R. 84 W., sixth principal meridian.

On June 13, 1989, BLM placed a memorandum in the record containing a report on its investigation of the trespass. That report added that the bypass ditch required by the watermaster had been constructed, so that "[w]ater was diverted out of the Albertson Ditch, passed around the new reservoir[,] and spilled overland back into its natural channel below
the reservoir." The report clarified that an "estimated 5 acres of public land [were] under cultivation in a crop of grass hay," and that the "area is part of a larger field owned by Peter Jaffe." Finally, the report observed, "Public land boundaries were definitely established by locating brass caps for two tract corners and a section corner. Location of these corners established that the reservoir, spillway, bypass ditch and about 5 acres of the hay filed are on public land. None of these facilities [has] been authorized."

On June 29, 1989, BLM wrote to Peter Jaffe:

> A recent examination of public lands located near the northwest end of your ranch indicates you are using public land without authorization. There are three locations where you have apparently conducted unauthorized activities. These are:
>
> 1. Construction of a small reservoir on the Albertson Ditch.
>
> 2. Construction of a bypass ditch around the above reservoir.
>
> 3. Cultivation of approximately five acres of public land adjacent [to] the northwest corner of your ranch.
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> This unauthorized activity is in violation of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1732) and Title 43 CFR Section 2920.1-2.

BLM requested a meeting and suggested working together with BLM to resolve the matter.

1/ BLM estimated the area of the reservoir at 0.2 acres in its subsequent report of investigation. Appellants estimate the size of the pond at one-eighth of an acre (Statement of Reasons at 4).

Jaffe, acting for Double J, replied on July 12 or 13, 1989, 2/ stating that he would "attempt to go out and take a look at the markers * * * to check on whether the fence line is in fact an incorrect boundary." On August 1, 1989, Jaffe supplemented his response, acknowledging that Double J had "unknowingly intercepted the Albertson Ditch during the construction of a pond," and that, once it had "learned of this inadvertent error," it had provided at its own expense "a short bypass ditch which goes around the pond and empties into the original ditch." Jaffe did not dispute that the dam, bypass ditch, and cultivated lands were placed on public lands. Jaffe instead contended that BLM should not compel him to remove the improvements made in trespass because, under Colorado State law, courts are invested with discretion to order curative action short of requiring removal of structures that impinge on rights held by right-of-way owners.

In a memorandum dated September 15, 1989, the Colorado State Director, BLM, advised the Grand Junction District Manager that Jaffe's position was "premised on the incorrect assumption that Mr. Jaffe owns the property that he constructed the reservoir on." The State Director noted that, under unspecified Departmental regulations, BLM could require an unauthorized user to vacate public lands being used in trespass, and to rehabilitate and stabilize any lands harmed by the trespass.

In an apparent effort to promote a settlement of the matter, the State Director also acknowledged that BLM has authority to grant Jaffe a right-of-way for the reservoir already constructed by him, provided that Albertson would suffer no harm from such grant. He advised that, notwithstanding the fact that Jaffe "holds a water storage right under Colorado law," BLM has discretion "to grant or reject a right-of-way in any given case," and that it could "reject a reservoir right-of-way application so long as [BLM's] decision to do so demonstrates a reasoned analysis of the factors involved, with due regard for the public interest." The State Director noted that Jaffe had offered to measure the water coming into the trespass reservoir from the Albertson Ditch and then releasing into that ditch the same amount, so that Albertson would receive the water to which he is entitled. He directed the Grand Junction District Manager to explore that option. He also directed him to consider imposing a stipulation on any right-of-way issued to Jaffe requiring him to maintain a by-pass ditch around the trespass pond.

On October 12, 1989, Jaffe apparently submitted to BLM a proposed solution to prevent potential harm to Albertson. First, Jaffe would construct a by-pass ditch around the reservoir and a stipulation would be imposed requiring him to maintain the ditch. In fact, as noted above, Jaffe had already taken that step. Second, in order to guarantee that Albertson would receive his entitlement, Jaffe would install two measuring devices, one above and one below the trespass reservoir. It appears that Albertson did not agree to those proposals, however.

2/ The letter bears two date stamps.

Albertson's posture against the proposal is documented in a November 22, 1989, BLM memorandum in the file. Based on that memorandum,
it appears that BLM decided to issue a formal notice of trespass to Jaffe requiring the removal of the trespass structures because Albertson continued to contend that "he will be harmed by the presence of Jaffe's pond on his ditch."

On December 13, 1989, BLM issued its decision ordering Jaffe and Double J to remove the dam and all water control gates and restore the affected land surfaces, and to remove the diversion intake structure at
the head of the bypass ditch, fill the ditch, and recontour the surface. BLM also demanded payment of administrative costs incurred by it as a
result of the trespass in the amount of $2,660.75. No penalties were imposed, however.

Double J and Jaffe filed a timely notice of appeal of BLM's decision.

[1] There is no dispute that the lands on which the dam, pond, and field are situated are Federal lands. It is also clear that no right-of-way or temporary use permit was issued to Double J or Jaffe, either to place the dam or pond on those lands or to cultivate them. Appellants admit that "[t]he pond, it now appears, although within the fenced borders of Double J, is in reality located on public land" (Statement of Reasons at 4).

Under 43 CFR 2801.3(a) (1989), in effect at the time the structures were placed in sec. 29, any use without authorization is a trespass and subjects that trespasser for liability for the trespass. Under the current version of 43 CFR 2801.3(a), which was in force when BLM issued its decision, occupancy or development of the public lands that requires a right-of-way, temporary use permit, or other authorization but that has not been so authorized is prohibited and constitutes a trespass. Appellants do not dispute BLM's finding that the uses cited in its decision were not authorized. Accordingly, under either version of the regulation, BLM correctly found that a trespass occurred.

[2] Appellants assert that the lands on which the improvements were constructed were within Double J's "historically fenced borders." It is well established that enclosing public lands by fencing them is itself an act of trespass. 43 U.S.C. § 1061 (1988); 43 CFR 9230.2-1. It is axiomatic that no legal entitlement is created by illegally enclosing lands. Thus, the fact that Federal lands on which the improvements were made may have been fenced as though they belonged to Double J is not significant in determining whether there was a trespass.

In this regard, we note that proceedings regarding an exchange proposal to resolve other boundary disputes between Double J and BLM (discussed below) had placed Double J on notice that the boundary of the Double J ranch was not at the fence line. BLM has presented documents showing that employees of BLM and Double J conducted an on-the-ground review of all public land adjacent to Double J property in 1985:

The proposal under Proposed Action (Section I) represents the exchange alternative both [Double J] and [BLM] found to best meet the [governing] values. In selecting the proposed action alternative, [BLM] and [Double J] reviewed both on the ground and in the field all public land located adjacent to the Double J * * * ranches. [Emphasis supplied.]

(Answer at Exh. 6 (Land Report, Sec. A.II.A.)). Even apart from the fact that BLM and Double J reviewed the ownership of all lands adjacent to the Double J ranch, the record is clear that the boundaries of the public lands in the vicinity of the trespass area were clearly marked by survey monuments (BLM June 13, 1989, Report of Investigation, quoted above). In these circumstances, we must conclude that Double J's representatives should have been aware of the trespass, regardless of how the lands may have been fenced.

[3] Appellants point to a land exchange between Double J and BLM under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1988), asserting that they relied on the fact that "the land trade had supposedly cured all trespasses" (Statement of Reasons at 4). In the same vein, they argue that they believed the exchange "would forever eliminate all 'trespasses'" and allow Double J to operate and improve its ranch within its fenced boundaries. Id. at 1-2. We take these statements to mean that BLM assertedly led representatives of Double J to believe that the land exchange would bring into Double J's ownership all lands known by BLM to be held in trespass during the pendency of the exchange application. 3/ Appellants essentially assert that, as a result, BLM is estopped from finding them to be in trespass and, presumably, assessing damages for the trespass.

The idea of an exchange was broached in April 1985. On April 23, 1986, a Notice of Realty Action (NORA), C-40267, was published in the Federal Register for an exchange between Double J and BLM. 78 FR 15388 (Apr. 23, 1986). The notice indicated that 549 acres of Federal lands had been determined to be suitable for exchange, in return for 556 acres of lands owned by Double J. The announced purposes of the exchange were, inter alia, to allow BLM to provide access to approximately 12,000 acres of previously unaccessible public lands, and to allow Double J to "resolve unauthorized occupancy and enclosure of public lands." A patent for the selected lands was issued in March 1987 (Answer at 7). 4/

3/ We cannot interpret the statements as suggesting that Double J believed that all future trespasses would be eliminated, as that would amount to a belief that a license to commit trespass had been granted. It would not be reasonable to expect such a concession in any circumstances.

4/ According to appellants, on Apr. 10, 1986, BLM unilaterally executed an "easement" (C-43071) affecting all of the roads contained in the parcel to be exchanged with Double J and reserving a right-of-way over those roads to the United States and its assignees and to the general public (Statement of Reasons at 2). BLM confirms that a "right-of-way for access road purposes" for BLM and the general public was originally reserved in the patent as

Estoppel is an extraordinary remedy, especially as it relates to public lands. Estoppel must be based upon "affirmative misconduct" by BLM, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); D. F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). 5/ We have ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." Henry E. Krizman, 104 IBLA 9, 11 (1988); United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975) (quoting Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974)). 6/ In order to prevail, a party making a claim of estoppel must show, inter alia, both that he was ignorant of the true facts and that he detrimentally relied on the conduct of BLM. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970); Terra Resources, Inc., 107 IBLA 10, 13 (1989). Thus, a party must show that he was misadvised by BLM and that he relied to his detriment on that misadvice.

We reject appellants' claim of estoppel for several reasons. The record shows, and BLM acknowledges, that BLM was aware in 1985 of the existence of an agricultural trespass (presumably cultivation of public lands) in the NW¼ NW¼ of sec. 29, the same area at issue in this case

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fn. 4 (continued)
issued in 1987. When BLM sought to enforce that right, Double J brought an action in Federal District Court to revoke the exchange (Answer at 7-8). The parties both indicate that a settlement was reached in which the scope of the disputed easement was reduced to cover only Government employees. That settlement was approved by the District Court on May 18, 1989 (Answer at Exh. 10).

We find nothing of relevance to the present dispute in the judicial proceeding. Contrary to appellants' suggestion, the land exchange was completed in March 1987 when patent was issued, when the question of the scope of the right-of-way was settled.

5/ Decisions of the U.S. Supreme Court have declined to hold that estoppel may not in any circumstances run against the Government. Heckler v. Community Health Services of Crawford, 467 U.S. 51 (1984); Schweiker v. Hansen, 450 U.S. 785, 788, reh'g denied, 451 U.S. 1032 (1981). These same cases, however, have refused to find that the traditional elements of estoppel have been met by the party asserting its protection, thus refuting any impression of hospitality toward claims of estoppel against the Government that earlier cases may have created. See, e.g., United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

6/ But see Enfield v. Kleppe, 566 F.2d 1139 (10th Cir. 1977), where the basis for asserting estoppel was a published Departmental regulation misinterpreting 30 U.S.C. § 226(e) (1988). Even though the party seeking to estop the Government apparently relied upon the regulation and refrained from actions that might have succeeded in extending his oil and gas leases, the court concluded that an administrative provision contrary to statute must be overturned no matter how well settled and how longstanding. Id. at 1142.

(Answer at 20, Exh. 6 (Land Report Exh. A Map 2)). However, we find no evidence that BLM ever concealed that fact, which was clearly set out in its Land Report on the exchange. Id. Further, we find nothing showing that BLM advised Double J, either in writing or orally, that the pending land exchange application would cover that trespass. Appellants have not provided any evidence that BLM did anything that would lead representatives of Double J to believe that all trespasses would be "eliminated" by completion of the exchange. 7/ By contrast, BLM has provided credible evidence, in the form of statements of BLM employees that participated in the exchange negotiations, showing that Double J's representatives were never advised that the exchange would resolve all outstanding trespasses (Answer at Exhs. 1-3 and 5). 8/

Further, Double J's representatives were not ignorant of the true facts here, as they could not reasonably have believed that the land exchange was intended to cover any lands in sec. 29, T. 2 S., R. 84 W., sixth principal meridian, where the trespass occurred. The lands that were received by Double J in the exchange were a matter of public record, having been published in the Federal Register. 78 FR 15388 (Apr. 23, 1986). That fact was obviously confirmed by the issuance of a patent in 1987 that did not contain those lands. It was thus well known that the lands coming to Double J in the exchange did not include sec. 29.

We also reject appellants' attempt to fault BLM for not actively attempting to resolve the trespass in the NW¼ NW¼ of sec. 29 by including that land in the land exchange negotiations. As noted above, BLM acknowledges that it was aware of the existence of an agricultural trespass in that area at the time the exchange was initiated and negotiated. 9/ However, the record also shows that BLM made Double J's representatives aware of where the public lands boundaries were in 1985, at the beginning of the exchange negotiations. Thus, they were put on notice that use of the lands in the NW¼ NW¼ of sec. 29 was in trespass and could have negotiated with BLM to include those lands in the exchange.

Once the proposal was under consideration, BLM had ample cause for not bringing those lands into the land exchange, as to do so would have

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7/ BLM has presented evidence indicating that negotiations concerning the exchange application were undertaken on Double J's behalf by Joan Jaffe. However, no statement from her appears in the record. As Peter Jaffe evidently did not participate in those negotiations, his statements as to what was agreed are unpersuasive.

8/ We discount the affidavit of Rex L. Wells, who states therein that he "did not have any direct contact or discussions with Mr. and Mrs. Jaffe nor with any employee of" Double J (Answer at Exh. 4).

9/ Of course, BLM was not aware of construction of the dam and pond at that time, as they had not been constructed. BLM did become aware of them around May 8, 1989, just a few days before the validity of the right-of-way imposed by BLM was resolved in court. However, the identity of the lands covered by the exchange had long since been determined in 1987, when patent was issued.

unbalanced the value of the private lands offered by Double J and the public lands it had selected (Answer at Exh. 2, ¶ 6 (Abbott Affidavit)) and jeopardized approval of the exchange. See 43 CFR 2201.3(a). Further, BLM could reasonably have viewed Double J's failure to request that the lands be included in the exchange as a decision to forgo further use of the lands. In any event, as noted above, BLM published the NORA, describing exactly what lands were covered by the exchange, in ample time for Double J to rectify the situation, if its representatives believed the lands had been mistakenly omitted.

Finally, appellants note that, if Double J had not constructed a pond, the trespass in sec. 29 might have "remained a non-issue * * * as it had in the past" (Statement of Reasons at 5). Even accepting the possibility that BLM might not have prosecuted the trespass if it had remained merely a matter of cultivating a few acres of public lands, it must be noted that Double J substantially raised the ante when it not only constructed permanent improvements on public lands, but threatened the water rights of a third party. BLM's failure to act to end a trespass cannot be regarded as a license to continue or expand that trespass. See 43 CFR 1810.3(a). We find no basis to fault BLM for taking action earlier in these circumstances.

[4] Under 43 CFR 2801.3 (1988), a trespasser is subject to "liability for the trespass." The current regulation, which was in effect when BLM issued the decision under appeal, clarifies that liability, holding anyone properly determined by BLM to be in trespass liable to the United States for (1) reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitating the lands harmed by the trespass or for the costs incurred by the United States in so doing. 43 CFR 2801.3(b). Appellants do not take issue with the details of BLM's assessment of liability, which, we hold, is in accordance with that regulation and is thus properly affirmed.

[5] It is also established that BLM may properly require the removal of improvements constructed in trespass on public lands, even where placed without knowledge of the trespass. Clive Kincaid, 111 IBLA 224 (1989). That authority is implied in the trespasser's liability either to "rehabilitate" lands harmed by the trespass or to pay the costs incurred by the United States in doing so. 43 CFR 2801.3(b)(3).

We note that appellants correctly point out that BLM is authorized by law to issue a right-of-way for the pond which would cure the trespass, allowing time to negotiate another land exchange. See, e.g., Juliet Marsh Brown, 64 IBLA 379 (1982). However, we are not aware that an application for right-of-way or exchange was filed, even though BLM advised appellants of the trespass and offered them time to resolve it. BLM indicates that it remains willing to entertain an application for a new exchange (Answer at 22) or right-of-way. Id. at 24. By this decision we affirm the propriety of BLM's decision ordering the removal of the trespass structures. However, if BLM wishes to extend the time allowed for removal to allow time to formally adjudicate an application for right-of-way or exchange, we perceive no barrier to its doing so. Appellants are reminded that,

under 43 CFR 2801.3(e) and 9239.7-1, BLM must refuse to issue a trespasser authorization to use the lands until the trespass claim is fully satisfied or the trespasser files a bond.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge